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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,
Petitioners,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF EDDIE KELLER AND WILLIAM CUMERO IN SUPPORT OF PETITIONERS HOWARD ELLIS, et al.

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TABLE OF CONTENTS

	Page
Interests of amici	1
Opinion below	2
Statement of the case	2
Summary of argument	2
Argument	3
Introduction	3
I	
Compelled financial support of labor organizations authorized by federal law infringes on First Amendment rights to freedom of speech and association	5
II	
Application of this analytical framework to the facts of this case demonstrates that the use of compelled fees for the challenged expenditures, such as organizing, cannot withstand constitutional scrutiny	10
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 2, 3, 4, 6, 7, 8, 9, 10, 11

Buckley v. Valeo, 424 U.S. 1, 22 (1976) 6

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 685 F.2d 1065 (9th Cir. 1982) 5, 7, 10, 11, 12

International Association of Machinists v. Street, 367 U.S. 740 (1961) 3, 4

Kusper v. Pontikes, 414 U.S. 51 (1973) 7, 8

National Association for the Advancement of Colored People v. Alabama (NAACP), 357 U.S. 449 (1958) 7

Railway Employees Department v. Hanson, 351 U.S. 225 (1956) 3, 6

Shelton v. Tucker, 364 U.S. 479 (1960) 6, 8, 9

United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973) 8

Constitution

United States Constitution, First Amendment 2, 5, 7, 8, 12, 13

Statutes

Railway Labor Act, 45 U.S.C.:

Section 151, et seq. 3

Section 152 Eleventh 3, 6

Rule

Supreme Court Rule, Rule 36 1

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INTERESTS OF AMICI

This brief amicus curiae is submitted on behalf of Eddie Keller and William Cumero pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the clerk of this Court.

Eddie Keller is a California attorney named as a plaintiff in litigation before the California courts challenging the use of mandatory state bar association dues for political and ideological purposes. William Cumero is a public school

teacher in California prosecuting litigation before the California courts challenging the use of compelled agency shop fees for political and ideological activities. In both cases, the litigation is based on this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and on legal arguments stemming from that decision that are contrary to the conclusions made by the court below. This Court's decision in the instant action will have a profound impact on the litigation being prosecuted by Messrs. Keller and Cumero. Due to amici's posture as litigants in related cases, amici hope to bring to this case both experience on the issues before the Court and an indication of the broad ranging impacts that will result from resolution of this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 685 F.2d 1065 (9th Cir. 1982).

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in petitioners' opening brief.

SUMMARY OF ARGUMENT

1. For purposes of testing the constitutionality of government regulation, compelled association through compelled financial support is no different than a prohibition on association. In both cases, First Amendment freedoms of the regulated individual are implicated. To survive constitutional scrutiny, therefore, the regulation must actually advance a compelling governmental interest and be tightly

drawn so as to avoid unnecessary abridgment of First Amendment freedoms.

2. Application of this analysis to the facts of this case demonstrates that the use of compelled fees for the challenged expenditures, such as organizing, cannot withstand constitutional scrutiny.

ARGUMENT

INTRODUCTION

The Railway Labor Act (45 U.S.C. §§ 151, *et seq.*) authorizes employers engaged in interstate rail or air commerce and labor organizations to agree to an agency (or union) shop fee arrangement which requires all employees to become members of that labor organization as a condition of continued employment. 45 U.S.C. § 152 Eleventh. In light of the fact that labor organizations engage in a variety of activities arguably unrelated to "collective bargaining," it is not surprising that this Court has had before it several challenges to the constitutionality of agency shop fee arrangements authorized by 45 U.S.C. § 152 Eleventh and similar state laws. *E.g., Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education, supra.*

In *Hanson*, this Court upheld the facial constitutionality of the agency shop fee provisions of 45 U.S.C. § 152 Eleventh, but withheld judgment on the constitutionality of the use of such fees for purposes not germane to collective bargaining. *Railway Employees Department v. Hanson*, 351 U.S. at 238. This Court held that there were simply no facts

in the record to raise those issues. *Id.* The issue of expending fees for noncollective bargaining purposes was faced by the Court in *Street*. The Court in that case, however, did not decide the constitutionality of such expenditures. *International Association of Machinists v. Street*, 367 U.S. at 749 (plurality opinion). Instead, the Court invoked the doctrine against unnecessary constitutional decisions and held that the Railway Labor Act itself prohibited noncollective bargaining uses of dissenting employees' compelled fees. *Id.* at 749, 768-69. The record before the Court, however, did not provide a basis for determining which expenditures were proper and which were not. *See id.* at 769. Finally, in *Abood v. Detroit Board of Education*, the Court was squarely faced with the constitutionality of agency shop fees and the permissible uses of such fees. The Court held such fees constitutional so long as dissenting employees' fees were expended for purposes germane to collective bargaining, contract administration, and grievance adjustment. *Abood*, 431 U.S. at 225-26. Again, however, the record before the Court was insufficient to determine the types of expenditures that fell within those three categories. *Id.* at 236. It is against this backdrop that the Court is confronted with the instant action—a case that raises the issues left undecided by *Abood* and *Street*.

Amici's purpose in submitting this brief is to suggest to the Court an analytical framework by which the instant case and future similar fact patterns—whether they be agency shop fees or integrated bar dues—may be solved. Once established, such an analytical framework will serve to guide the lower courts in similar litigation and will help this Court to avoid becoming embroiled in a case-by-case

determination of the propriety of each and every possible expenditure made by labor organizations. The decision below, unfortunately, is devoid of such an analytical framework. The court below ignored this Court's holding that allowable[1] expenditures are those germane to collective bargaining, contract administration, and grievance adjustment. Instead, the lower court adopted a much broader and more permissive test of whether the "challenged expenditure is germane to the union's work in the realm of collective bargaining." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d 1065, 1072 (9th Cir. 1982). The breadth and vagueness of such a test indicate a failure by the lower court to conduct the close and searching scrutiny required by the First Amendment.

I

COMPELLED FINANCIAL SUPPORT OF LABOR ORGANIZATIONS AUTHORIZED BY FEDERAL LAW INFRINGES ON FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH AND ASSOCIATION

A successful analytical framework cannot begin with the simple statement that the Court has already ruled on the facial constitutionality of agency shop fee arrangements. Rather, the interests impacted by such arrangements and governmental rationales for allowing them must first be reviewed. At issue is a federal law authorization, and the availability of federal judiciary enforcement, of a contract provision that requires an employee, as a condition of continued employment, to pay to the exclusive representative

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[1]The term "allowable expenditures" is used here to mean those expenditures that are constitutionally allocable to dissenting employees.

of the employees fees and periodic dues charged to voluntary members. 45 U.S.C. § 152 Eleventh. The governmental involvement of authorization and enforcement is sufficient government action to bring into play the protections of the Federal Constitution. *Abood*, 431 U.S. at 226; *Hanson*, 351 U.S. at 232 n.4. The constitutional interests of the dissenting employee alleged to be implicated by such agreements are the First Amendment freedoms of speech and association.

This Court has recognized that the freedom to associate with others for advancement of ideas and beliefs is "a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). This right of association is exercised not only by joining a group or meeting with others, but also by the act of contributing money to the group. Such a contribution, this Court has noted, serves to affiliate the individual with a group or cause and allows like minded persons to pool their resources to further the cause. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976). A necessary corollary to the freedom to associate with others is the freedom to refrain from such associations.

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. [Footnote omitted.] For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35 (citations omitted).

The Court's use of the terms "political" and "ideological" in *Abood* to describe unallowable[2] uses of the dissenters' compelled contribution was not intended to constitute an exhaustive list of proscribed uses of those fees. Indeed, the Court in *Abood* emphasized:

> "[O]ur cases have never suggested that expressions about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. [Footnote omitted.] . . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry." *Id.* at 231-32.[3]

This acknowledgment of the breadth of the protections provided by the First Amendment was merely a reiteration of what this Court had noted nearly two decades prior to the *Abood* decision.

> "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ." *National Association for the Advancement of Colored People v. Alabama (NAACP)*, 357 U.S. 449, 460 (1958).

Thus, compelled financial contribution to a labor organization—regardless of the purpose such contributions will be put to—infringes on "fundamental personal liberties." *See Abood*, 431 U.S. at 222; *Kusper v. Pontikes*, 414 U.S. 51, 59

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[2]*See* Footnote No. 1, *supra*.

[3]In spite of this language, the court below apparently fell into the trap of testing whether the contested expenditure could be labeled "political" or ideological. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d at 1068.

(1973); *Shelton v. Tucker*, 364 U.S. at 488. This is not to say that such rights are inviolate. There do exist, as a practical matter in an organized society, governmental interests that will override individual freedoms. *See United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973).

Although it is recognized that the government may occasionally need to override the rights of the individual, any such governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 357 U.S. at 461. It makes no difference whether the government in pursuit of its own interests intended or even foresaw the interference with individual liberties. *Id.* at 461. To survive the required "closest scrutiny," the governmental interest must be compelling. *Id.* at 464. Even with a compelling justification, the government must do all that is possible to avoid injury to First Amendment rights.

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton*, 364 U.S. at 488 (footnotes omitted). *See Kusper v. Pontikes*, 414 U.S. at 59.

Thus, although compelled payment of an agency shop fee violates the dissenting employees' First Amendment rights to freedom of speech and association (*see Abood*, 431 U.S. at 222), these rights can be subordinated in the face of a

compelling governmental interest (*see id.* at 224). The means of achieving that interest, however, must be narrowly drawn to avoid unnecessary infringement of fundamental personal liberties. *Shelton*, 364 U.S. at 488. This Court has determined that the maintenance of labor peace and stability is a compelling governmental interest. *See Abood*, 431 U.S. at 224-25. This interest is advanced through the selection of an exclusive agent to bargain on behalf of the employees in the unit. *See id.* at 224. Maintenance of labor peace and stability requires that all who share in the benefits obtained by the exclusive representative also share in the costs incurred in gaining those benefits. *See id.* This is not to say, however, that the dissenting employee must contribute to *all* costs incurred by the exclusive representative. Application of the least drastic means test commands that the dissenting employee be required to contribute only to those costs of the exclusive representative that actually advance the compelling governmental interest of labor peace and stability. Thus, as this Court implied in its *Abood* decision, the dissenting employee should only be required to contribute his or her pro rata share of the costs of "collective bargaining, contract administration, and grievance adjustment . . . ." *Id.* at 225-26.

II

APPLICATION OF THIS ANALYTICAL FRAMEWORK TO THE FACTS OF THIS CASE DEMONSTRATES THAT THE USE OF COMPELLED FEES FOR THE CHALLENGED EXPENDITURES, SUCH AS ORGANIZING, CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY

As noted above, the lower court rejected this Court's *Abood* holding that agency fees are constitutional insofar as they are expended for "collective bargaining, contract administration, and grievance adjustment." *Abood*, 431 U.S. 225-26. Instead, the lower court adopted a much broader test:

> "[W]e believe that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d at 1072.[4]

Aside from the failure to follow this Court's decision in *Abood*, the lower court's overly broad formulation demonstrates its utter failure to engage in close and exacting scrutiny and to apply the least drastic means test to the expenditures at issue. The lower court's analysis of the expenditures for recruiting and organizing is indicative of this failure.

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[4] A reading of the lower court's majority opinion reveals that that court's use of the term "collective bargaining" not only subsumes this Court's tripartite formulation of "collective bargaining, contract administration, and grievance adjustment," but also every other conceivable activity of a labor organization with the exception of partisan political activity. *See id.* at 1072 n.5.

The sum total of the lower court's analysis of expenses for organizing is contained in the following three sentences:

> "Maximum organization of an industry benefits employees and units already organized. A union is considerably strengthened if it eliminates competition from non-union employers and a stronger union is unquestionably a more effective collective bargaining agent. Successful organizing efforts thus can strengthen the union's position at the collective bargaining table immeasurably." *Id.* at 1074.

That such analysis is overly simplistic is demonstrated by the breadth of the issue that was actually before the court. At issue was:

> "'(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.
>
> "(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:
>
> "(a) employees not employed by Western Airlines;
>
> "(b) employees not employed in the air transportation industry;
>
> "(c) employees not employed in other transportation industries.'" *Id.* at 1075. (Whelan, J., dissenting).

Each of these challenged recruiting activities must be scrutinized with regard to whether they advance the compelling interest of labor stability. Such scrutiny reveals that challenges to each of these expenditures must be sustained.

In *Abood,* this Court noted that the governmental interest of labor peace and stability is served by a system of

exclusive representation and a cost sharing scheme that ensures the exclusive representative will be able to carry out its duties to represent fairly all employees in the unit. This interest is obviously *not* served by requiring the dissenting employee to contribute to the cost of membership drives within the bargaining unit. Since all employees in the unit are already required to pay an agency fee, any *additional* financial benefit gained by the labor organization by reason of acquiring new members, by definition, would not go to support activities in furtherance of the proffered governmental interest. Instead, such additional financial resources would be used to carry on activities the dissenting employee could not constitutionally be compelled to finance.

Similarly, organizing and recruiting employees of other employers and employees in unrelated industries cannot be said to advance the stated governmental interest. The lower court's simplistic approach speaks in terms of eliminating "competition from non-union employers." *Id.* at 1074. In point of fact, however, labor organizations do not compete with "non-union employers," they compete with "non-union" employees. Such competition does nothing to further the governmental interest of maintaining an exclusive representative. Whether or not employees in other industries belong to the same labor organization simply has no bearing on the organization's duties as the exclusive representative. Thus, to compel dissenting employees to contribute to the cost of a labor organization's organizing and recruiting activities would violate the employees' First Amendment rights to freedom of speech and association.

CONCLUSION

To compel an employee to contribute to a labor organization infringes on the employee's First Amendment rights to freedom of speech and association. This infringement can be justified, however, in the instance of a compelling governmental interest. Even when the governmental interest is compelling, that interest is subject to a "least drastic means" analysis to ensure that fundamental personal liberties are not unnecessarily infringed. In the case of employer-employee relations, the compelling governmental interest of labor peace and stability is promoted by ensuring that the exclusive collective bargaining representative has sufficient resources to carry out its duties. The least drastic means of furthering this interest is to allow compulsion of all employees to contribute to the costs of bargaining, contract administration, and grievance adjustment. To compel dissenting employees to contribute to any other activity of the labor organization goes beyond the governmental interest involved and violates the employees' First Amendment rights to freedom of speech and association.

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Respectfully submitted,

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